UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ALCOA INC. AND ALCOA COMMERCIAL WINDOWS, LLC D/B/A TRACO,	)	
Petitioner,	)	
	)	**CASE NO.** 15-60848
v.	)	
NATIONAL LABOR RELATIONS BOARD,	)	
Respondent.	)	

PETITION FOR REVIEW OF A DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Pursuant to Rule 15(a) of the Federal Rules of Appellate Procedure, Petitioners Alcoa Inc. and Alcoa Commercial Windows, LLC d/b/a/ TRACO hereby petition this Court to review and set aside the ruling in the Decision and Order of the National Labor Relations Board ("NLRB") reported at 363 NLRB No. 39 entered on November 16, 2015. A copy of the NLRB Decision and Order is attached hereto.

Respectfully submitted:

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on this 2nd day of December, 2015, the foregoing **Petition for Review of a Decision and Order of the National Labor Relations Board** was served upon the following persons via U.S. Mail and was filed with the Clerk of the Court which will send notification of the filing to the following persons at the addresses shown below:

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By: */s/Stephen E. Hart*
Stephen E. Hart

Alcoa, Inc. and Alcoa Commercial Windows, LLC d/b/a TRACO, a single employer *and* United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO, CLC.
Case 06–CA–065365

November 16, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND MCFERRAN

On September 20, 2013, Administrative Law Judge Mark Carissimi issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[1]

The Board has considered the decision and the record in light of the exceptions[2] and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions and to adopt the recommended Order.[4]

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[1] In its answer to the complaint, the Respondents raised the following affirmative defense:

> The National Labor Relations Board's Acting General Counsel was improperly and unlawfully appointed and cannot lawfully take any action in this matter.

At the hearing the Respondents did not offer any evidence or argument in support of this affirmative defense, and the Respondents' posthearing briefs made no reference thereto. The only filing related to this affirmative defense was "Respondents' Supplemental Authority in Support of Post-Hearing Brief," filed August 27, 2013. This document referred to the decision in *Hooks v. Kitsap Tenant Support Services.*, 2013 WL 4094344 (W.D. Wash. August 13, 2013), which the Respondents argued was relevant to its affirmative defense challenging the "appointment" of the Acting General Counsel.

On September 20, 2013, the judge issued a decision rejecting the Respondents' argument that the Acting General Counsel was "unlawfully appointed," and finding that the Respondents violated the Act in various respects. Thereafter, the Respondents filed exceptions arguing, inter alia, that the judge erred in rejecting the holding of *Hooks v. Kitsap*, supra, and refusing to find the Acting General Counsel's "appointment" to be invalid, and that the judge erred in failing to address Respondents' affirmative defense that the Acting General Counsel was unlawfully "appointed" on other grounds. In their brief in support of their exceptions, the Respondents did not elaborate on their argument that the Acting General Counsel was "improperly appointed" other than to cite *Hooks v. Kitsap*, supra, for the proposition that the court examined the "appropriateness of the Acting General Counsel's appointment." Nor did they identify the "other grounds" referenced in their exceptions for challenging his "appointment."

For the reasons set forth below, we find no merit in the Respondents' argument that the Acting General Counsel was improperly or unlawfully "appointed." At the outset, we note that under the Federal Vacancies Reform Act (FVRA), 5 U.S.C. §§ 3345 et seq., a person is not "appointed" to serve in an acting capacity in a vacant office that otherwise would be filled by appointment by the President, by and with the advice and consent of the Senate. Rather, either the first assistant to the vacant office performs the functions and duties of the office in an acting capacity by operation of law pursuant to 5 U.S.C. § 3345(a)(1), or the President directs another person to perform the functions and duties of the vacant office in an acting capacity pursuant to 5 U.S.C. § 3345(a)(2) or (3).

On June 18, 2010, the President directed Lafe Solomon, then-Director of the NLRB's Office of Representation Appeals to serve as Acting General Counsel pursuant to subsection (a)(3) —the senior agency employee provision. Under the strictures of that provision, Solomon was eligible to serve as Acting General Counsel at the time the President directed him to do so. See, *S.W. General, Inc. v. NLRB*, No. 14–1107, 2015 WL 4666487 (D.C. Cir. Aug. 7, 2015). Thus, Solomon properly assumed the duties of Acting General Counsel and we find no merit in the Respondents' affirmative defense that the Acting General Counsel was "improperly and unlawfully appointed."

We acknowledge that the decision in *S.W. General* also held that Solomon lost his authority as Acting General Counsel on January 5, 2011, when the President nominated him to be General Counsel. While that question is still in litigation, the Respondents have never raised that argument in this proceeding, and we find that the Respondents thereby have waived the right to do so.

Finally, on October 5, 2015, General Counsel Richard F. Griffin, Jr., issued a notice of ratification which states, in relevant part,

> I was confirmed as General Counsel on November 4, 2013. After appropriate review and consultation with my staff, I have decided that the issuance of the complaint in this case and its continued prosecution are a proper exercise of the General Counsel's broad and unreviewable discretion under section 3(d) of the Act.
>
> My action does not reflect an agreement with the appellate court ruling in *S.W. General.* Rather, my ratification authorizes the continued prosecution of this matter and facilitates the timely resolution of the charges that I have found meritorious. Congress expressly exempted "the General Counsel of the National Labor Relations Board" from the FVRA provisions that would otherwise preclude the ratification of certain actions of other persons found to have served in violation of the FVRA. (Citation omitted.)
>
> For the foregoing reasons, I hereby ratify the issuance and continued prosecution of the complaint.

Thus, even assuming that the Respondent had not previously waived its right to challenge the continued authority of the Acting General Counsel following his nomination by the President, this ratification renders moot any argument that *S.W. General* precludes further litigation in this matter.

[2] No exceptions were filed to the judge's dismissal of the allegation that Respondents promulgated a solicitation and distribution policy that violated Sec. 8(a)(1).

[3] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

As the judge correctly noted, the Board considers four factors in determining whether two or more entities constitute a single employer, but does not require that all four factors be present. We find that the factors of common ownership, interrelationship of operations, and centralized control of labor relations amply support the judge's finding

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, Alcoa Inc. and Alcoa Commercial Windows, LLC d/b/a TRACO (a single employer), Cranberry Township, Pennsylvania, their officers, agents, successors, and assigns shall take the action set forth in the Order.

Dated, Washington, D.C. November 16, 2015

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT deny our off duty and offsite employees access to the exterior nonwork areas, including parking lots of our Cranberry Township, Pennsylvania facility for the purpose of engaging in the distribution of union organizational materials on behalf of the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO, CLC, or any other labor organization.

WE WILL NOT engage in surveillance of employees engaged in union and protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL grant our off duty and offsite employees access to the exterior nonwork areas, including parking lots, at our Cranberry Township, Pennsylvania facility.

ALCOA INC. AND ALCOA COMMERCIAL WINDOWS, LLC D/B/A TRACO, A SINGLE EMPLOYER

The Board's decision can be found at www.nlrb.gov/case/06–CA–065365 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202)273-1940.

David Shepley and *Emily Sala, Esqs.*, for the Acting General Counsel.
Ruthie Goodboe and *Scott Dietrich, Esqs.*, for the Respondent.
Brad Manzolillo, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARK CARISSIMI, Administrative Law Judge. This case was tried in Pittsburgh, Pennsylvania, on July 10 and 11, 2013. The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO, CLC (the Union) filed the charge on September 23, 2011,[1] and the Acting General Counsel issued the complaint on April 18, 2013.

that Alcoa Inc. and TRACO constitute a single employer. We find it unnecessary to pass on the judge's finding that the fourth factor, common management, is also present. See, e.g., *Chemical Solvents Inc.*, 362 NLRB No. 164, slip op. at 8–9 (2015) (single-employer status found despite absence of common management factor). Accord, *Flat Dog Productions, Inc.*, 347 NLRB 1180, 1181–1182 (2006) (single-employer status found notwithstanding absence of interrelationship of operations factor).

[4] We have substituted a new notice in accordance with *Durham School Services*, 360 NLRB No. 85 (2014).

[1] All dates are in 2011, unless otherwise indicated.

On the entire record, including my observation of the demeanor of the witnesses,[2] and after considering the briefs filed by the Acting General Counsel, Respondent Alcoa Inc. and Respondent Alcoa Commercial Windows, LLC d/b/a Traco (at times referred to as the Respondents)[3] and the Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, Alcoa Inc., a Pennsylvania corporation, and the parent company of Alcoa Commercial Windows, LLC d/b/a. Traco (Traco) as well as the parent of Reynolds Metals Co. and Kawneer Co., Inc. and numerous other subsidiaries and indirect subsidiaries, with a corporate center in Pittsburgh, Pennsylvania, and other facilities in Pennsylvania has been engaged in the mining of bauxite and production of aluminum, as well as the manufacturer of aluminum-related products. Alcoa Inc., in conducting its operations described above, purchased and received at its Pennsylvania facilities goods valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania. Alcoa Inc. admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all material times, Traco, a Pennsylvania LLC, with offices and a place of business in Cranberry Township, Pennsylvania, (Traco's facility), has been engaged in the manufacture and sale of commercial aluminum windows for the construction industry. During the 12-month period ending August 31, 2011, Traco, in conducting its operations described above, purchased and received at its Cranberry Township, Pennsylvania facility goods valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania. Traco admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (the Act).

I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The complaint alleges that Alcoa Inc. and Traco (collectively referred to in the complaint as the Respondent) constitute a single-integrated business enterprise and a single employer within the meaning of the Act. The complaint further alleges that the Respondent violated Section 8(a)(1) of the Act on September 8, 2011, through supervisors and agents, by engaging in surveillance of employees engaged in union activity in the parking lots and exterior nonwork areas of Traco's Cranberry Township facility. The complaint further alleges that the Respondent violated Section 8(a)(1) on or about September 8, 2011, by preventing the Respondent's employees who were on nonworking time from having access to the parking lot and exterior nonwork areas of the Respondent's Cranberry Township facility to engage in organizing activities, including handing out union handbills to the Respondent's employees who were on nonworking time. Finally, the complaint alleges that on or about June 27, 2011, the Respondent has promulgated and since then has maintained an overly broad solicitation and distribution policy in violation of Section 8(a)(1) of the Act.

The Procedural Issue

The Respondents raised in their answers to the complaint the affirmative defense that the Acting General Counsel was unlawfully appointed and cannot take any action in this matter. Respondents contend in their "supplemental authority in support of post-hearing brief" that I should dismiss the instant complaint based on a decision of a U.S district court in *Hooks v. Kitsap Tenant Support Services, Inc.*, 2013 WL 4094344 (W.D. Wash. August 13, 2013). In *Hooks* the court held that President Obama's appointment of the Acting General Counsel pursuant to the Federal Vacancies Reform Act (FVRA) was invalid. In *Belgrove Post Acute Care Center*, 359 NLRB No.77, slip op. at 1 fn. 1 (2013), the Board addressed such a claim and found no merit to it. I am, of course, bound to follow Board precedent unless and until it is reversed by the Supreme Court. *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984); *Iowa Beef Packers*, 144 NLRB 615 (1963), enfd. in part 331 F.2d 176 (8th Cir. 1964). Accordingly, I deny the Respondent's motion to dismiss the complaint based on this argument.

Facts

Background

Alcoa Inc. is a multinational corporation with more than 300 subsidiaries worldwide, including over 100 subsidiaries in the United States. In 2011, Alcoa Inc. and its subsidiaries employed over 61,000 employees. Alcoa Inc.'s headquarters are located in New York, New York.

Traco is a wholly-owned subsidiary of the Reynolds Metals Co. (Reynolds Metals) which is a wholly owned subsidiary of Alcoa Inc. Reynolds Metals formed Traco which purchased the assets of Three Rivers Aluminum Company on or about July 30, 2010. Kawneer Co., Inc. (Kawneer) is a wholly owned subsidiary of Alumax, Inc., which, in turn, is a wholly owned subsidiary of Alcoa Inc. Traco is a division of Kawneer for business and marketing.

Traco manufactures commercial windows and doors at its only facility, which is located at 71 Progress Avenue, Cranberry Township, Pennsylvania. Traco's employees are not represented by a labor organization. There are approximately 650 employees at the plant. The Traco facility is located at the intersection of Progress Avenue and Unionville Road, both of which are two-lane roads. Traco's facility is located to the east of Unionville Road and south of Progress Avenue. (Jt. Exh.

[2] In making my findings regarding the credibility of witnesses, I have considered their demeanor, the content of the testimony, and the inherent probabilities based on the record as a whole. In certain instances, I credited some but not all, of what the witness said. I note, in this regard, that "nothing is more common in all kinds of judicial decisions than to believe some and not all" of the testimony of a witness. *Jerry Ryce Builders*, 352 NLRB 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951). See also *J. Shaw Associates, LLC*, 349 NLRB 939, 939–940 (2007).

[3] On August 27, 2013, that Respondents filed a "Respondents' supplemental authority in support of post-hearing brief" bringing to my attention the decision in *Hooks v. Kitsap Tenant Support Services*, 2013 WL 409-43440 (W. D .Wash. August 13, 2013). On September 11, 2013, the Acting General Counsel filed a reply brief on this issue.

15.) There are stop signs at the intersection of Progress Avenue and Unionville Road and a crosswalk is located at that intersection. Another crosswalk is located approximately 40 feet south on Unionville Road. The grounds of the Traco facility includes three major production buildings, designated as A, B, and C. There are parking areas located adjacent to each production building which can be entered by driveways from the public roads. There are three entrances on Unionville Road, but the southernmost entrance is gated and used only for truck traffic. There are also two entrances into the facility on Progress Avenue. Traco also owns two employee parking lots located across Unionville Road to the west of the facility. Employees who use these parking lots enter the grounds of the Traco facility by walking on two walkways from the southernmost parking lot that lead to the crosswalks that cross Unionville Road.

In late 2010, some Traco employees contacted the Union to see if it was interested in representing them. From late 2010 to September 2011, Philip Ornot, an organizer for the Union, made approximately six visits to the facility to observe where the entrances were in order to assess the potential to pass out handbills in support of the Union. Ornot directed an individual on his staff to contact the local police authorities to determine where handbillers would be permitted to stand. It was reported to Ornot that the police indicated that handbilling was permitted in the 3-foot right-of-way on the side of the public roads and at the crosswalks. Ornot was further informed that the police had indicated that handbillers could not interfere with ingress and egress and were not permitted to park along Progress Avenue or Unionville Road.

The Events of September 7 and 8, 2011

On September 7, 2011, the Union held a conference in Pittsburgh, Pennsylvania, for union representatives and members employed at facilities owned by Alcoa Inc. throughout the world. At the conference, Ornot addressed the group and asked for volunteers to participate in organizational leafleting at Traco's Cranberry facility on September 8. Traco's Cranberry facility is located near Pittsburgh. Twenty four individuals, including Ornot, volunteered to participate in that activity.

According to the uncontroverted testimony of Brad Manzolillo, the Union's organizing counsel, he was asked on approximately September 6 to assist in attempting to gain offsite employees access to the outdoor areas of the Traco facility. Manzolillo drafted a letter explaining the Union's position regarding the right of employees of Alcoa Inc. to have access to the outdoor areas of the facility. Manzolillo also volunteered to participate in the organizational activities scheduled for September 8.

According to the uncontroverted testimony of Kevin O'Brien, Alcoa Inc.'s director of industrial relations, on September 7, he received a call from Jim Robinson, the Union's District 7 director and chairman of the negotiating committee for the Alcoa Inc. master agreement, regarding the planned handbilling activity.[4] Robinson informed O'Brien that the Union was holding a conference for union representatives from facilities owned by Alcoa Inc. throughout the world. Robinson told O'Brien that he wanted to give him a "heads up" that individuals from that group intended to hand out union literature at the Traco facility the next day at the shift change. O'Brien replied that he appreciated the fact that Robinson called him in advance and told Robinson that individuals have the right to be in the right-of-way adjacent to the plant in order to hand out literature. Robinson asked if they would be permitted into the parking lots in order to distribute the union literature. O'Brien replied that he did not know if that was appropriate and he wanted to consult with legal counsel.

O'Brien then discussed the matter with two attorneys in the legal department of Alcoa Inc., Scott Dietrich and Nick Storm. After discussing the matter with Dietrich and Storm, O'Brien again spoke to Robinson late in the afternoon of September 7. O'Brien told Robinson that, under the advice of counsel, any individuals who are not employees of Traco could not enter the property and would have to stay on the right-of-way. O'Brien told Robinson, "We recognized and respected their right to be adjacent to the plant and to have their demonstration or hand out literature, whatever they were going to do, but that it would not be proper for them to go in the parking lot." (Tr. 279.)

O'Brien then called Jeffrey Jost, the then plant manager at Traco. In a conference call that included O'Brien, Jost, other Traco managers and attorneys from Alcoa Inc., O'Brien told Jost about his conversation with Robinson and that Jost could expect a large group from the Union to be present at the plant at the shift change the next day. O'Brien testified that during the call that he and the Alcoa Inc. attorneys gave Jost "our advice as to what was the appropriate way to handle it" (Tr. 281). O'Brien also told Jost that if there was a problem with the Union the next day that Jost could call him and O'Brien gave Jost his cell phone number.

On September 8 at approximately 5:30 a.m., Ornot arrived in a van with other individuals from the Union and at the intersection of Progress Avenue and Unionville Road. According to Ornot's credited testimony, there were 24 handbillers present when everybody had arrived.[5] The handbillers assembled in an area on the west side of Unionville Road directly across the street from an entrance into the Traco grounds. When Ornot arrived, he observed three individuals standing at an entrance to the Traco grounds across Unionville Road from where he was located. Ornot crossed Unionville Road to speak to these individuals and an individual who he later learned was Plant Manager Jost asked him who was in charge. Ornot replied that he was and identified himself as an organizer for the Union. Ornot told Jost that he had checked with the local police department and knew where they were allowed to be. Jost stated that "he was fine with that, but he did not want us on Alcoa property." (Tr. 146.) Ornot then went back across the street and began to direct where the handbillers were to stand and attempt to hand out handbills to Traco employees. There were no Traco employees involved in the effort to distribute handbills that day.

[4] Robinson and O'Brien had an ongoing working relationship because of their involvement in the negotiations for the master agreement between the Union and Alcoa, Inc.

[5] Since Ornot was in charge of the handbilling activities on that day and was responsible for soliciting the volunteers, I find his testimony regarding the number of handbillers present to be more accurate than Manzolillo's estimate that approximately 30 handbillers were present.

Manzolillo arrived at the intersection of Progress Avenue and Unionville Road shortly after Ornot. Jim Robinson and Mike Yoffee, the Union's director of organizing, were also there along with employees of Alcoa Inc. and other union representatives. The handbilllers assembled on the west side of Unionville Road across the street from an entrance to the Traco facility. Manzolillo asked if there were individuals present who were from the midwestern United States. Mazolillo recalled Jeff Hartford indicating that he was the president of USW Local 105 at Alcoa Inc.'s Davenport, Iowa facility. Manzolillo also recalled an employee from Alcoa Inc.'s Lafayette, Indiana plant raising his hand.[6]

Manzolillo and the individuals who had identified themselves as Alcoa Inc. employees crossed Unionville Road and Manzolillo introduced himself to the individuals who were standing at the entrance to the grounds of the facility at the northernmost crosswalk. Manzolillo initially met with Eileen Clancy, Traco's human resources director; Jessica Marnick, a human resources representative; and Plant Manager Nick Randall. After Manzolillo introduced himself, he explained that the individuals with him were Alcoa Inc. employees from the midwestern United States and that the Union believed that those employees had a right to distribute literature in the parking lots and other outside areas of the facility. Manzolillo told Clancy that the rights of those employees were distinct from his and those of the other people standing across the street. Manzolillo gave Clancy a letter dated September 8, 2011, which he had drafted. This letter (Jt. Exh. 14) indicates, in relevant part, the following:

> I am an attorney representing the United Steelworkers (USW). In the coming weeks, professional organizers from the USW, along with employees from other Alcoa facilities will be handbilling and providing information about the USW to employees at Alcoa's facility located in Cranberry. To avoid any conflict, we wanted to clear up a confusing area of labor law. As discussed below, off-duty employees at Alcoa's Cranberry facility have a legal right to access to parking lots and other outdoor areas of facility for purposes of union organizing and related matters. Employees from other Alcoa facilities have the same access rights to the outdoor areas of the Cranberry facilities.
>
> . . . .
>
> In conclusion, both off-duty employees from the Alcoa Cranberry facility and employees from other Alcoa facilities have access rights to the Cranberry facility for the purposes of distributing union literature and soliciting union support. These access rights apply to all outdoor areas of facility.

Clancy informed Manzolillo that it was their position that the employees from other Alcoa Inc. facilities did not have the right of access to the facility. Manzolillo and Clancy continued to discuss the issue and Clancy maintained the position that employees from other Alcoa facilities would not be admitted into the outside areas of the facility. At one point in the conversation, and individual who Manzolillo later learned was Plant Manager Randall, indicated that employees from other Alcoa facilities at times come onto the site but that they need IDs and clearance. When Manzolillo indicated an interest in pursuing that procedure, he was told that such clearance had to be preapproved and the conversation stalled. At that point, General Manager Jost arrived at the meeting and Manzolillo gave him the same explanation with respect to what the Union believed were the access rights of employees from Alcoa Inc. that were with him. He also gave Jost the same letter that he had given to Clancy. Jost also replied that it was their position that those employees were not going to be given access to the outdoor areas of facility. Jost indicated that he had been in contact with O'Brien and suggested that Manzolillo give him a call. Jost called O'Brien on his cell phone and spoke with him briefly and then handed the phone to Manzolillo. Manzolillo specifically told O'Brien that the Union believed that the employees of other Alcoa facilities that were present had a right to access the outdoor areas of the facility for purposes of handbilling. (Tr. 36.) O'Brien asked him if he had spoken to Robinson and Manzolillo indicated that he had. O'Brien indicated that they were not going to give Alcoa Inc. employees access to the Traco facility as Traco is a subsidiary of Alcoa Inc. O'Brien also stated that he understood that the Union was going to file an unfair labor practice charge over the matter.

After his conversation with O'Brien, Manzolillo indicated to Jost and Clancy that he understood their position and that the Union would "deal with it legally how we had to" and went back across street with the Alcoa Inc. employees who had accompanied him. (Tr. 37.)

After Manzolillo reported the position of Alcoa Inc. and Traco to the other union officials, Ornot began to station the 24 handbillers at the entrances to the Traco facility. As noted above, across from the Traco facility at the intersection of Progress Avenue and Unionville Road are two adjoining employee parking lots. From the southernmost parking lot there are two walkways that lead to the crosswalks that cross Unionville Road into the Traco grounds. There are also two paths that go between the two walkways.

When Manzolillo first arrived at the intersection of Progress Avenue and Unionville Road he estimated there were approximately 15 handbillers at the crosswalk closest to the intersection of Progress Avenue and Unionville Road and approximately 6 at the crosswalk that was approximately 40 feet south of the first crosswalk. According to Manzolillo's credited testimony, after some of the handbillers started to deploy to the other entrances, seven or eight handbillers remained on the walkway from the parking lot leading to the northernmost crosswalk on Unionville Road and approximately three or four handbillers remained on the walkway leading to the other crosswalk. (Tr. 44–45.) The record establishes that there were approximately two or three handbillers located at each of the two entrances into the Traco facility that were farther south on Unionville Road. These handbillers stood in the right-of-way on the same

[6] The parties stipulated that on September 8, 2011, Alcoa, Inc. and the Union were parties to a collective-bargaining agreement at Alcoa, Inc.'s Davenport, Iowa, and Lafayette, Indiana facilities. (Jt. Exh. 1, par. 35 and Jt. Exh. 13.) The parties further stipulated that on September 8, 2011, that at least one employee of the Davenport, Iowa facility and at least one employee of the Lafayette, Indiana facility attempted to gain access to Traco's parking lot and other nonproduction outside areas. (Tr. 106–107.)

side of Unionville Road as the Traco facility. There were also two to three handbillers at the two entrances to the facility on Progress Avenue. These handbillers stood in the right-of-way on the same side of Progress Avenue as the Traco facility.

As Traco employees entered and exited the Traco facility, the union handbillers would offer them handbills (GC Exh. 2) stating, in relevant part:

> Greetings Traco employees!
>
> We are your unionized coworkers from ALCOA (Traco's parent company), and union representatives for ALCOA workers from all over the world. We work at, and represent thousands of workers in ALCOA facilities including the US, Canada, Europe, South America, Africa and Australia.
>
> We are visiting with you today, because we are in Pittsburgh this week for a meeting of ALCOA union's from all over the world, which is being hosted by the United Steelworkers (USW) and the Australian Workers Union.
>
> We are very happy that you are considering joining together with us, through the USW, for stronger voice in your work lives, and we encourage you to sign a USW union card today!
>
> In solidarity,
>
> Your ALCOA Co-Workers and Union Representatives

The handbill further advised employees that there were union meetings for Traco employees were being held on September 13 and 14 at a nearby hotel.

The uncontroverted and credited testimony of Ornot and Manzolillo establishes that at approximately 6 a.m. Jost crossed Unionville Road and stood in the walkway nearest to the intersection of Progress Avenue and Unionville Road, between where the handbillers stood and the employee parking lot.[7] As noted above, by the time that Jost arrived in that area there were approximately seven to eight handbillers distributing handbills to employees on that walkway .Jost positioned himself approximately 10 feet away from the handbillers. Employees arriving for work and exiting the parking lot would have to go by Jost before they reached the area where the handbillers stood. Jost stood in that area for approximately 20 to 30 minutes. Both Ornot and Manzolillo testified that they observed Jost briefly speaking to employees but could not hear what he said as, at that time, they were located in the area of the other crosswalk, which was approximately 40 feet away.

Since Ornot was responsible for the Union's handbilling activities that day, he walked to each of the entrances throughout the morning. When Ornot arrived at the entrance to the facility on Progress Avenue that was closest to the intersection of Progress Avenue and Unionville Road, he noticed there was nobody passing out handbills. Ornot began to pass out handbills to employees entering and exiting the Traco facility and called on his cell phone for other individuals to come to that location. As Ornot offered a handbill to an employee in a car that was leaving the facility, Jost came up directly behind the car as Ornot gave the employee the handbill. Jost told Ornot that he "was getting kind of far on Alcoa property." (Tr. 167.) Ornot replied that he was not as he was standing at the edge of the road. There was no further conversation between them at that time.

The handbillers were present at the Traco facility until approximately 7:30 a.m. on September 8. During that time there were management representatives and security guards in the employee parking lots that were adjacent to the Traco facility on the east side of Unionville Road. From time to time security personnel would drive down Unionville Road and Progress Avenue. One security guard stood at the end of the crosswalk that was south of the intersection of Progress Avenue and Unionville Road where the crosswalk entered Traco property. On approximately six occasions throughout the morning, the security guard would come to approximately the midpoint of the crosswalk and escort employees across Unionville Road. On some occasions he did this when no cars were coming down Unionville Road.

Current employee Chuck Kreibel testified that he worked at the Cranberry facility for 28 years and had never observed management representatives standing in the parking lots prior to September 8, 2011. There is no evidence that any of the handbillers blocked ingress or egress on September 8. The Union has not returned to handbill at the Traco facility since that date.

Analysis

Whether Alcoa Inc. and Traco Constitute a Single Employer

The Acting General Counsel and the Union contend that Alcoa Inc. and Traco constitute a single employer under the standards utilized by the Board to determine this issue. Alcoa Inc. and Traco contend that they are separate employers and do not constitute a single employer.

It is well established that in determining whether two entities constitute a single employer, the Board considers the following four factors: (1) common ownership, (2) common management, (3) interrelation of operations, and (4) centralized control of labor relations. *Massey Energy Co.*, 358 NLRB 1643, 1654–1655 (2012); *Dow Chemical Co.*, 326 NLRB 288 (1998); *Masland Industries*, 311 NLRB 184, 186 (1993). While the Board considers control of labor relations to be a significant indication of single-employer status, no single factor is controlling and not all of the factors need to be present. The determination of a single-employer relationship depends on all the circumstances and is characterized by the absence of the arm's-length relationship found among unintegrated entities. *Bolivar-Tees, Inc.*, 349 NLRB 720 (2007); *Dow Chemical Co.*, supra; *Masland Industries*, supra.

Alcoa Inc.'s ownership of Traco, through its wholly owned subsidiary Reynolds Metals, demonstrates common ownership for the purposes of determining single-employer status. As noted above, common ownership by itself, however, does not establish a single-employer relationship but is only one of the factors to be considered.

The management structure of Respondent Alcoa Inc. and its subsidiaries is somewhat complex but it is necessary to set forth certain aspects of these relationships in order to properly assess the issues of common management, interrelationship of operations and control of labor relations. Traco and Kawneer are

[7] Jost did not testify at the trial.

both included in Respondent Alcoa Inc.'s Global Building and Construction Systems (BCS) business unit and the BCS business unit is in turn included in the Engineered Products and Solutions (EPS) business group.

Pursuant to a stipulation reached by the parties, on October 25, 2012, Traco had 15 corporate officers: 10 were employed by Alcoa Inc.; 3 were employed by Kawneer; and 2 were employed by Traco. During the relevant time period, three individuals were corporate officers for both Traco and Alcoa Inc. During the period from January 1, 2011, through October 15, 2012, 22 individuals employed in management positions by Alcoa Inc. or an entity owned by Alcoa Inc., accepted a management position at Traco. (Jt. Exh. 1, par. 7, Jt. Exh. 2.) None of these individuals were involuntarily transferred to Traco. They all applied for open positions at Traco and were hired. Applicants can obtain information about available management positions at Traco on an internal posting portal referred to as the "Brass Ring," which is managed by a recruiting team that is part of Alcoa Inc. The same management positions are also posted on the public Alcoa website. (Tr. 324–325.)

Jost was the general manager of Traco until November 2011 when Thomas Van Sumeren succeeded him. Traco's general manager possesses the authority to make the day-to-day decisions regarding the operation facility. In this regard the general manager bears responsibility at the Traco facility for health and safety, production quality, hiring hourly paid employees, scheduling, maintenance, and engineering. Kawneer is involved, however, regarding the development of new products and whether existing products should be discontinued. Jost reported to Glen Morrison, the president of BCS. Morrison made the decision to remove Jost from his position as the general manager of the Traco. At the time of the hearing, Van Sumeren reported to Diana Perrieah, a vice president of BCS and general manager of Kawneer North America.

Regarding the interrelation of operations, it appears that Alcoa Inc. acquired Traco in an effort to enhance the product lines offered by BCS. Alcoa Inc.'s 2010 annual report indicated that it "added to our portfolio the commercial window business of Traco, which solidifies Alcoa's exterior building and construction systems offerings." (GC Exh. 5, p. 3.) Alcoa Inc. issued a press release (GC Exh. 12) when it agreed to purchase Traco which indicated:

> "Traco's strong brand and product lines are well known throughout the commercial building market and we look forward to helping the brand continue to flourish," said Glen Morrison, President of Alcoa Building and Construction Systems, who will oversee the business. "The Traco portfolio of products and commitment to quality customer service dovetails with Alcoa's focus on customers. Through this combination we see many opportunities to grow our collective business through better service, more comprehensive product offerings and greater efficiency.
>
> We are excited about the growth potential presented by this transaction and looking forward to deploying strategies to realize these opportunities once it is completed."
>
> . . . .
>
> When the sale is completed, Traco will become part of Alcoa Building and Construction Systems (BCS), a global provider of architectural systems, services and building products to the construction market, serving customers throughout North America, Europe, North Africa, Asia and the Middle East. Alcoa Building and Construction Systems includes the Kawneer brand of architectural aluminum systems, and Alcoa Architectural Products. Kawneer designs, develops and sells windows, doors, curtain walls, sliding patio doors and conservatories throughout the world.

A Pittsburgh Post Gazette article dated May 12, 2011, which quoted Jost extensively, reported that Alcoa Inc. had transferred to Traco the production of windows and window frames that had been previously made at either other Alcoa plants or outside contractors. (Jt. Exh 9.)[8]

Since March 2011 to the present, Traco has obtained the business services necessary for its operation as follows. Global Business Services, has provided information services infrastructure support. Global Shared Services-Financial Accounting Services has provided financial accounting services. Global Shared Services-People Services has provided benefits administration, and payroll in human resources management. All of these entities are departments of Alcoa Inc. and the services that they provide are paid by Traco through intercompany accounting charges.

During the same period Kawneer has provided Traco with research and development support and marketing and product management support. The services provided by Kawneer are also paid through intercompany accounting charges.

Traco does not file its own Federal income tax return. Its financial results are incorporated into the results of Reynolds Metals, which are then reported on Alcoa Inc.'s consolidated federal corporate income tax return. Since January 1, 2011, Alcoa Inc.'s tax department has prepared and filed Traco's tax returns for various States and local government entities.

Further evidence of the interrelationship between Traco and Alcoa Inc. is contained in a safety video that Traco began using in June 2012 (GC Exh. 4). The training video is shown to all visitors to Traco's facility in order to ensure their safety. The video displays both the Traco and Alcoa logo at the beginning. The transcript of the video contains the following:

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[8] In their brief, the Respondents contend that, while they stipulated to the introduction into evidence of the article as there is no question about its authenticity, they do not stipulate that the contents of the article were accurate. (R. Br. 6 fn. 5.) The Respondents argue that the article constitutes hearsay to the extent it is considered for the truth of the matter asserted in it. I note that the Respondents did not call Jost as a witness to refute any of the statements contained in the article. While the statements made in the article are hearsay, I find that the article was corroborated by the admissions made by Alcoa, Inc. in its press releases regarding the manner in which Traco was assimilated into its operations. Accordingly, I find that the statements made in the article have an indicia of reliability about them and are probative. I have therefore considered the statements made in the article in reaching my decision. In *RJR Communications, Inc.*, 248 NLRB 920, 921 (1980), the Board indicated that hearsay evidence is admissible and can be relied on if it is "rationally probative in force" and is corroborated.

> As a visitor at Alcoa Traco please realize that you are expected to be a safety conscious worker and must abide by all Alcoa safety rules and regulations. These rules and regulations are in place for your protection. And failure to comply may result in dismissal from the facility.

The transcript of the safety video further indicates that on approximately eight occasions various managers who appear on video refer to the employer as "Alcoa Traco."

When Alcoa Inc. acquired Traco from Three Rivers in 2010 an employee handbook was in effect. Traco did not implement a new handbook until March 1, 2012. The cover page of the handbook indicates "Traco A Division of Kawneer" and reflects it was revised on January 1, 2012. The handbook contains several references to Alcoa with respect to the portion of the handbook entitled "Position on Unions" contains the following:

> Alcoa's experience is that non-union operations change faster in response to business needs than their union counterparts. Alcoa firmly believes that it is in our best interest, and that of our customers, to maintain our nonunion, competitive workplace. [GC Exh. 11, p. 7.]

The provision entitled "Alcoa Ethics and Compliance Line" (GC Exh. 11, p. 8) states in relevant part:

> Alcoa's Business Conduct Policies commit the company to business relationships that comply with all applicable laws. Additionally, Alcoa's values identify a behavior model that makes compliance a part of the culture. The ethics and compliance line-with its support of all employees-is a proven method of identifying criminal activities and potential breaches of the company's business conduct policies.

The handbook directs employees who believe that there has been a violation of Alcoa's business conduct policies to contact Alcoa Inc.'s general counsel. There are additional references to "Alcoa" throughout the handbook including: the use of the computer system, benefits; holidays; equal employment opportunities; the environmental, health and safety program, and the tuition assistance program.

From approximately September 8, 2011, through approximately July 2012, applicants for employment at Traco filled out an application for employment that made no mention of Traco. The job application form had the name "Alcoa" at the top. The form also asked the question, "Have you ever been employed by Alcoa?" (Jt. Exh. 1, par. 11, Jt. Exh. 6.)

With respect to the centralized control of labor relations, as noted earlier, Kevin O'Brien is the director of Alcoa Inc.'s department of industrial relations. His office is located in the Alcoa Inc. corporate center in Pittsburgh, Pennsylvania. The record does not indicate the number of individuals that are employed in this department. O'Brien testified that his staff is a "resource to the businesses of Alcoa providing services in the area of labor relations." (Tr. 272.) In this connection, the industrial relations department provides services such as negotiating contracts and arbitration. If a subsidiary of Alcoa Inc. requests services in the area of union avoidance, the industrial relations provides that service. O'Brien testified that in locations where the employees are not represented by a union, it is the philosophy of Alcoa Inc. to promote positive employer relations so that a union is not needed.

The normal practice is that a subsidiary of Alcoa that utilizes the services of the industrial relations department is billed at a daily rate. The business unit receiving the services would not be presented with a bill but rather would pay for the services through intercompany accounting charges. However, business units, including Traco, are not charged for phone calls seeking the advice of the industrial relations department.

As previously noted, on September 7, 2011, Union Representative Robinson called O'Brien and told him that on September 8 the Union would have handbilllers at the Traco facility that included union representatives from other Alcoa Inc. facilities. Robinson asked if the handbillers will be permitted onto the Traco parking lots in order to handbill in support of the Union. O'Brien responded that he did not know if that was appropriate and he wanted to consult with counsel before he replied to Robinson's request for access. O'Brien then discussed Robinson's request with two attorneys employed by Alcoa Inc. O'Brien spoke to Robinson later that day and informed him that any individuals who were not employed by Traco would not be permitted on the Traco property and would have to stay on the public right-of-way.

It was only after that O'Brien had informed the Union that Alcoa Inc. and Traco would not permit any individuals not employed by Traco on the Traco property to handbill, that O'Brien had a conference call with Jost and other Traco managers to inform them of the handbilling that would take place the next day. Along with attorneys from Alcoa Inc., O'Brien advised Jost as to the appropriate way to handle the situation.[9] O'Brien told Jost that if there were any problems with the Union the next day, Jost could call him.

The next day both Clancy and Jost told Manzolillo that Traco would not grant access to the employees of Alcoa Inc. that were present in order for them to distribute handbills on behalf of the Union in the parking lots adjacent to the facility. That they did so was hardly surprising since the decision that only employees of Traco would be permitted access to the parking lots had already been made the day before by O'Brien and attorneys employed by Alcoa Inc. and had already been communicated to the Union. After briefly speaking to Manzolillo, Jost, asked Manzolillo if he would like to speak to O'Brien about the issue. O'Brien asked Manzolillo if he had spoken to Robinson about this issue and when Manzolillo indicated that he had, O'Brien confirmed what he had previously told Robinson and said that "they" were not going to give access to Alcoa Inc. employees to handbill on Traco property.

There is no credible evidence in this record to establish that Traco managers made an independent decision to bar Alcoa Inc. employees from the parking lots of the Traco facility on September 8. Clancy and Jost did not testify at the trial and

[9] At the trial Respondent's counsel objected to any specific questions asked of O'Brien by counsel for the Acting General Counsel in his 611(c) examination regarding the advice that was given during the telephone call since attorneys were present on the call, claiming that such information was privileged. I sustained the objection. (Tr. 281–282.)

while Randall did testify on behalf of the Respondent, he was not asked any questions regarding the decision to deny access to Alcoa Inc. employees to the Traco facility on September 8.[10]

Beyond the critical events of September 7 and 8, 2011, there is other evidence of the involvement of Alcoa Inc. in the labor relations policy of Traco. In 2010, shortly after Alcoa Inc. acquired Traco, O'Brien and a member of Alcoa Inc.'s legal apartment went to the Traco facility to conduct a 6-hour course for Traco managers. O'Brien testified that focus of this course was on positive employer relations training, including avoiding unionization.

At some point in 2011, prior to the events of September 8, O'Brien received a call from Clancy. Clancy informed O'Brien that some union literature had been found in the plant and asked what if any action Traco should take. O'Brien asked some specific questions about the literature and advised Clancy as to some of the "dos and don'ts" about responding to a union organizational attempt. O'Brien also provided additional advice on how Traco could avoid having the facility organized.

Further evidence of Alcoa Inc.'s involvement in the labor relations of Traco is the role that it's agents played in providing information for the "town hall" meetings that were held at Traco on September 13 and 14, 2011, shortly after the Union's handbilling efforts.[11] At this meeting Randall presented a power point presentation that he had prepared. (Jt. Exh. 10.) The presentation included production data and a fatality prevention video which featured BCS President Morrison. It also included a lengthy presentation that was focused on attempting to convince employees to avoid being represented by a union at the Traco facility. This portion of the presentation was based on materials supplied by O'Brien and attorneys from who will render Alcoa Inc. and relies heavily on information regarding Alcoa Inc.'s involvement with unions. For example the power point presentation contained the following information:

> Within Alcoa 2 out of 3 plants in the U.S. are nonunion.
>
> Job security comes from working together to meet our customers needs and staying competitive. . . NOT from a union contract Business conditions have caused several Alcoa unionized plans to close in recent years including . . . .
>
Lebanon, PA	Frederick, Maryland
Badin, North Carolina	Rockdale, Texas
Texarkana, Texas	Tifton, Georgia
Hawesville, Kentucky	Beloit, Wisconsin
>
> Having a union did not cause these plans to fail . . . but it couldn't save them either.

[10] Melissa Miller, the human relations director for Alcoa, Inc.'s BCS business unit, testified that Alcoa, Inc.'s industrial relations department does not make labor relations decisions for Traco. According to Miller, the industrial relations department provides counsel but the local management at Traco makes all decisions regarding labor relations. I do not credit Miller's testimony as it was vague and generalized. Miller does not work at Traco and had no personal knowledge of the events at issue. Additionally, I find her testimony implausible when the record is considered as a whole.

[11] Town hall meetings are regularly scheduled meetings held by Traco in order for management to communicate with employees regarding production, safety, and other issues affecting the plant.

In determining whether two companies constitute a single employer, the Board has noted that "the fundamental inquiry is whether there exists overall control of critical matters at the policy level by one company over the other. *Emsing's Supermarket*, 284 NLRB 302 (1987), enfd. 872 F.2d 1279 (7th Cir. 1989). In the instant case, an examination of the four factors traditionally relied on by the Board in determining single-employer cases reveals that Alcoa Inc. exerts sufficient overall control over Traco, at the policy level, particularly with respect to labor relations so that Alcoa Inc. and Traco constitute a single employer.

As noted above, Alcoa Inc. owns Traco through its wholly owned subsidiary Reynolds Metals, and thus the element of common ownership is present. With respect to the issues of common management the record establishes that on October 25, 2012, 10 of Traco's corporate officers were employed by Alcoa Inc., 3 were employed by Kawneer and only 2 were employed by Traco. Morrison, who is the president of Alcoa Inc.'s BCS business unit and a corporate officer of Traco, made the decision to relieve Jost as the general manager of Traco in November 2011. Currently, Diana Perrieah, a vice president of BCS and general manager of Kawneer, has the authority to remove Jost's successor, Van Sumeren.

The day-to-day operations of the Traco plant in September 2011 were supervised by Jost and Randall and the evidence indicates that the Traco general manager and plant manager have continued to exercise such authority. As noted above, Alcoa Inc. has over 300 subsidiaries worldwide and collectively those enterprises employ over 61,000 employees. Given the scope of these operations, it is not surprising that Alcoa Inc. does not exercise day-to-day control over the management of the Traco facility. However, as noted above, Jost was removed as general manager by Morrison, the president of BCS, a business unit of Alcoa Inc. That type of control over the Traco management continues to exist as Perrieah, a vice president of BCS, has the authority to remove the present General Manager Van Sumeren. Thus, while Alcoa Inc. does not control the day-to-day management of the Traco plant, it exercises some control over the direction of the enterprise by possessing the authority to remove the general manager of the Traco facility.

Given the strength of some of the other factors I have considered in determining whether Alcoa Inc. and Traco are a single employer, the absence of common day-to-day management is not sufficient to overcome those factors particularly when there is some evidence of overall control of critical management matters at the policy level. See *Spurlino Materials, LLC*, 357 NLRB 1510, 1516 (2011).

With regard to the interrelationship of operations, when Alcoa Inc. acquired Traco in late 2010, Alcoa Inc. made it clear to its 2010 annual report and press releases that it intended to integrate the commercial windows made by Traco into the line of products it offered through BCS and thus have a more complete product line. In this connection, Alcoa Inc. transferred the production of window frames from other Alcoa Inc. facilities and contractors to the Traco facility.

In addition, Traco obtains important business services from Global Business Services; Global Shared Services-Financial;

and Global Shared Services-People. All of these are departments of Alcoa Inc. In addition, as discussed in detail above, Traco has also received significant services from the industrial relations department of Alcoa Inc. The services these entities provide for Traco are paid for by intercompany accounting charges, Invoices are not provided to Traco. The Board found that such transactions between related companies are not entirely at arm's length. *Spurlino Services*, supra at 1518.

Traco does not file a separate Federal corporate tax return, but rather its financial results are incorporated into those of Reynolds Metals, and reported on Alcoa Inc.'s tax return. In *Royal Typewriter Co.*, 209 NLRB 1006 (1974), enfd. 533 F.2d 1030 (8th Cir. 1976), the Board found that Litton Industries and its subsidiary Royal Typewriter were a single employer. In so finding, the Board noted that if Litton Industries divisions dealt with each other, payments were not made in cash, rather the price was charged against the earnings of one division and credited to the income of another. The financial statements and the annual report of Litton Industries showed profits, losses, assets, and liabilities for Litton Industries as a whole rather than for any subsidiaries or divisions.

Further evidence of the interrelationship between Alcoa Inc. and Traco is the fact that they have held themselves out to the public and employees as an integrated enterprise. In this regard, the training video which is used to inform visitors to the Traco facility of safety concerns reflects that failure to abide by all Alcoa safety rules would result in dismissal from the facility. In addition, the Traco managers who appear in the video make several references to the facility as "Alcoa/Traco." The employee handbook implemented at Traco on March 1, 2012, sets forth information regarding Alcoa's position on unions. It further directs employees to contact Alcoa Inc.'s general counsel if they believe that there has been a violation of Alcoa's business practices. The handbook also makes several references to Alcoa when setting forth employment policies in a number of areas. Finally, for the period from September 2011 through July 2012, applicants for employment at Traco filled out an application that did not contain Traco's name but merely stated "Alcoa" at the top of the application. Further, the application asked applicants, "Have you ever been employed by Alcoa?"

The Board has found that when two allegedly separate employers hold themselves out to the public and employees as an integrated enterprise, it is an important factor in finding that an interrelationship of operations exists. *Masland Industries*, 311 NLRB 184, 187 (1993); *Cardio Data Systems Corp.*, 264 NLRB 37, 41 (1982), enfd. mem. 720 F.2d 660 (3d Cir. 1983).

Considering the foregoing, I find that there is significant interrelationship of operations between Alcoa Inc. and Trico and that this factor strongly supports a finding that they constitute a single employer.

With respect to the critical factor of control of labor relations, the events of September 7 and 8, 2011, establishes that Alcoa Inc. made the decision to deny its employees access to the parking lot of Traco in order to engage in organizational handbilling. As set forth in detail above, O'Brien was contacted on September 7, 2011, by Robinson who informed him of the Union's plan to engage in organizational handbilling at the Traco facility with individuals that included union representatives from Alcoa Inc. facilities. Robinson also requested that these individuals be given access to the Traco parking lot in order to distribute handbills. After consulting with the attorneys employed by Alcoa Inc., O'Brien informed Robinson that only employees from Traco would be given access to the parking lots. It was only after notifying the Union of the position of Alcoa Inc. and Traco regarding the Union's request for access to the Traco parking lots that O'Brien, in conjunction with attorneys from Alcoa Inc., notified Jost and other Traco managers in a conference call of the call he had received from the Union. O'Brien and corporate counsel from Alcoa Inc. then advised Jost and other members of Traco management of the manner in which to handle the impending organizational handbilling. Consistent with the decision made by O'Brien and Alcoa Inc. corporate counsel, Jost and Clancy reiterated to Manzolillo the decision that agents of Alcoa Inc. had made the previous day and communicated to the Union, i.e., that only employees of Traco were entitled to access to the parking lots and not employees of Alcoa Inc. Finally, O'Brien confirmed to Manzolillo the decision that employees of Alcoa Inc. would not be granted access to the parking lots of the Traco facility in order to engage in organizational handbilling.

I find that the evidence regarding the events of September 7 and 8, 2011, and all reasonable inferences drawn from that evidence, establishes that the decision to bar Alcoa Inc. employees from the parking lots of the Traco facility was made by O'Brien and corporate counsel of Alcoa Inc. and that Traco managers had no involvement in arriving at that decision. Rather, Jost and the other managers of Traco acquiesced in a decision that had already been made and communicated to the Union without any input from them. In *Royal Typewriter Co.*, supra at 1008–1011, the Board found that while Royal Typewriter controlled day-to-day labor relations, the extensive participation by agents of Litton Industries in the conduct alleged to be an unfair labor practice was a significant factor in finding that Royal Typewriter and Litton Industries constituted a single employer.

In addition to the critical events of September 7 and 8, 2011, there is additional evidence which establishes Alcoa Inc.'s control over the labor relations of Traco at the policy level. In this connection, shortly after Traco's acquisition by Alcoa Inc., O'Brien and an Alcoa Inc. attorney conducted a daylong training course for Traco managers. The focus of this course was positive employer relations, which included information in keeping the facility free from union organization. In 2011, prior to the events of September 7 and 8, O'Brien gave instructions to Clancy regarding what actions Traco should take regarding union literature that had been discovered at the plant. Finally in mid-September 2011 shortly after the Union's organizational handbilling at the Traco facility, O'Brien and Alcoa Inc. attorneys supplied material to Traco management to be used in a power point presentation. The information supplied by Alcoa Inc. included information to employees about Alcoa Inc.'s experience with unions and attempted to convince the employees to remain nonunion.

I find that the evidence clearly establishes that Alcoa Inc. exerted control over the labor relations of Traco at the policy level. Because of the scale of the operations of Alcoa Inc., I

recognize that it does not exercise control over the daily labor relation issues arising daily at the Traco plant. The Board has consistently held, however, that it is sufficient if control over labor relations exists as to critical issues. *Pathology Institute*, 320 NLRB 1050, 1063–1064 (1996), enfd. 116 F.3d 482 (9th Cir. 1997); *Emsing's Supermarkets*, supra; *Royal Typewriter*, supra.

I find the Board's decisions in *Dow Chemical Co.*, 326 NLRB 288 (1998), and *Western Union Corp.*, 224 NLRB 274 (1976), relied on by the Respondent to be distinguishable from the instant case.

In *Dow Chemical*, supra, the Board found that the respondent, Dow Chemical, and its wholly-owned subsidiary, DowBrands, Inc., did not constitute a single employer. The Board found that the only factor in support of a single-employer finding was common ownership. The Board found no significant common management or interrelated operations, but particularly noted that the labor relations functions of Dow Chemical and DowBrands were completely separate.

In *Western Union Corp.*, supra, the parent company Western Union Telegraph Co. (Western Union) created a holding company Western Union Corp. (WUC), and four new subsidiaries, Teleprocessing Industries, Inc. (TII), Western Union Data Services Co., Inc. (DSC), Western Union Realty Corp. (WURC), and GiftAmerica (GA). In finding that Western Union was not a single employer with WUC and the four subsidiaries, the Board found that only common ownership was present. The Board found that there was a lack of common management or interrelationship of operations. The Board found that it was significant that Western Union's chief labor relations official was not in any way involved with the labor relations policies of the subsidiaries.

In the instant case, the record establishes that Alcoa Inc. owns Traco, that there is a substantial interrelationship of operations between the two, and that Alcoa Inc. controls the labor relations of Traco at the policy level. Under the circumstances, the fact that Alcoa Inc. does not exercise day-to-day control over Traco management and its control appears to be limited to removing high-level managers of Traco, does not diminish the fact that Alcoa Inc. and Traco operate as a single employer. The other three factors considered by the Board strongly support a finding of single employer and the Board has clearly indicated that not all of the factors need to be present. Accordingly, I find that Alcoa Inc. and Traco constitute a single employer.[12]

Whether the Respondent Violated Section 8(a)(1) of the Act by Refusing to Grant Alcoa Inc. Employees Access to the Parking Lots and Exterior Nonworking Areas of the Traco Facility for the Purpose of Organizational Handbilling

The Acting General Counsel and the Union contend that the Respondent violated Section 8(a)(1) of the Act by denying Alcoa Inc. employees from its Indiana and Iowa plants access to the Traco parking lots and other exterior areas for the purposes of organizational handbilling on September 8, 2011.

The Respondent first contends that it did not violate Section 8(a)(1) of the Act by denying employees employed by Alcoa Inc. access to the parking lots another exterior areas of the Traco facility because Alcoa Inc. and Traco are not a single employer and therefore Alcoa Inc. employees have no greater right of access to Traco's private property than any other nonemployee. The Respondent argues alternatively, however, that if I should find that Alcoa Inc. and Traco are a single employer, it still did not violate Section 8(a)(1) by precluding employees employed at other Alcoa Inc. facilities from organizational handbilling on the Traco parking lots. The Respondent contends that it granted those employees reasonable access to its property by permitting them to engage in organizational handbilling on the walkways connected to some of its employee parking lots. The Respondent argues that giving further access to the Traco parking lots would have impeded safe employee ingress and egress into the facility.

In *Tri-County Medical Center*, 222 NLRB 1089 (1976), the Board found that an employer violated Section 8(a)(1) by preventing an employee, who worked at facility, from distributing literature on the employer's parking lot on the day when he was not scheduled to work. In its decision, the Board held that an employer rule that denies off-duty employees entry to outside nonworking areas of the employer's facility will be found invalid, except where such a rule was justified by a legitimate business reason.

In *Hillhaven Highland House*, 336 NLRB 646 (2001), enfd. 344 F.2d 523 (6th Cir. 2003), the Board considered the right of an employee to have access to the employer's property at a facility other than the one that the employee worked at in order to exercise organizational Section 7 rights. In *Hillhaven*, the Board addressed issues raised by the court's decision in *ITT Industries v. NLRB*, 251 F.3d 995 (D.C. Cir. 2001). In *ITT Industries*, the court denied enforcement of the Board's order[13] and remanded the case to the Board in order for it to consider the court's concerns regarding the Board's decision to apply the *Tri-County Medical Center* test regarding access of an employer's employee to the facility where the employee worked to the right of access to a facility by employees of the employer who worked at another facility.

In *Hillhaven,* supra at 648, the Board held:

> (1) [U]nder Section 7 of the act, off-site employees (in contrast to nonemployee union organizers) have a nonderivative access right, for organizational purposes, to their employer's facilities; (2) that an employer may well have heightened private property-right concerns when offsite (as opposed to onsite) employees seek access to his property to exercise their Section 7 rights; but (3) that, on balance, the Section 7 organizational rights of offsite employees entitled them to access to the outside, nonworking areas of the employer's property, except where justified by business reasons, which may involve considerations not applicable to access by off-duty, onsite employees. To this extent, the test for determining the right to access for offsite visiting employees differs, at least in practi-

[12] Since I find Alcoa Inc. and Traco to be a single employer, I will refer to them collectively as the Respondent throughout the remainder of this decision.

[13] *ITT Industries,* 331 NLRB 4 (2001).

cal effect, from the *Tri-County* test for off-duty, onsite employees.

In its supplemental decision in *ITT Industries,* 341 NLRB 937, 939 (2004), enfd. 413 F.3d 64 (D.C. Cir. 2005), the Board noted the following with regard to its previous decision in *Hillhaven*:

> With respect to the Section 7 rights of offsite employees, the Board stressed that when offsite employees seek to organize similarly situated employees at another employer facility, the employees seek strength in numbers to increase the power of their union and to improve their own working conditions. Regarding an employer's private property concerns, the Board recognized that an employer confronted by access claims of offsite employees may be faced with unique problems implicating security, traffic control, and the like. The Board found, however, that an "an employer's property interests, as well as its related management interest, may be given due recognition without granting it the unqualified right to exclude off-ite employees pursuing organizational activity." In discussing the balancing of Section 7 rights and property concerns, the Board cautioned, "that an employer must demonstrate why its security needs or related business justifications warrant restrictions on access by offsite employees," and that it would review "an employer's proffered justification carefully on a case-by-case basis." [Footnotes omitted.]

In applying the policy set forth above to the instant case, I must consider the additional factor that any access rights of Alcoa Inc. employees to be outside areas of the Traco facility is based upon the finding that Alcoa Inc. and Traco are a single employer. The Acting General Counsel concedes that there is no prior Board precedent that expressly holds that the employees of one entity that comprises part of a single employer have a right of access to the exterior areas of the plant of another entity that is also part of the single employer for purposes of organizational handbilling, but contends that such a right is implicit in the Board's decisions in *Hillhaven* and *ITT Industries*. In support of this position, the Acting General Counsel relies on the Board's analysis of the "struck work"[14] and "chain shop" contract provisions in *Amalgamated Lithographers of America and Local 78 (Miami Post Co.)*, 130 NLRB 968, 974–975 (1961), enf. denied in relevant part 301 F.2d 20 (5th Cir. 1962). In *Amalgamated Lithographers*, the General Counsel claimed that the "chain shop" clause was a secondary clause violative of Section 8(e) of the Act and the strike seeking to compel an employer to agree to the clause violated Section 8(b)(4)(i) and (ii)(A) of the Act. The clause provided:

> Each Company agrees that its employee shall not be requested to handle any work in the plant covered by this contract if in another lithographic plant which is wholly owned and controlled by the company or commonly owned and controlled, in any part of the United States or Canada, any Local of the Amalgamated Lithographers of America is on strike or members of such Local or International are locked out.

In finding the clause lawful, the Board stated:

> [W]e construe the "chain shop" clause as saying that a strike at the plant of the contracting employer in sympathy with the strike at the plant of another company which is a separate legal entity is permitted, provided that the two legal entities because of "common control" and "ownership" as the Board uses these terms, constitute a single employer within the meaning of the Act.[15] [Id. at 975.]

The Acting General Counsel argues that the Board's decision in *Amalgamated Lithographers* establishes that "the Board regards single-employer status as tantamount to same-employer status because the two employers constitute one employing entity." (AGC's Br. at 35.) The Acting General Counsel then argues that this principle should also apply to the instant case where employees of one entity constituting a part of a single employer seek to distribute literature on the property of another entity that is also part of that single employer. While I agree with the Acting General Counsel's argument, I find that *Mine Workers (Boich Mining Co.)*, 301 NLRB 872 (1991), more clearly supports the view that employees of two entities that constitute a single employer are the employees of the single employer. Boich and Aloe Coal were wholly owned subsidiaries of Aloe Holding Co. Employees at each facility were represented by the United Mine Workers International and its local unions. During a labor dispute between the union and Aloe Coal, the union called the employees of Boich out on strike in support of its strike against Aloe Coal. The General Counsel issued a complaint alleging that the respondents' action was "secondary" activity against a neutral employer, and therefore violated Section 8(b)(4)(B) of the Act. The Board found that Boich and Aloe Coal constituted a single employer and therefore the strike against Boich in support of the strike against Aloe Coal was lawful primary activity.

Since the Board has taken the position that employees of two different entities who constitute a single employer are the employees of the single employer for purposes of Section 8(B)(4) of the Act, I find the same analysis should be applied in determining the rights of employees under Section 8(a)(1) of the Act. Accordingly, I find that pursuant to the policy set forth in *Hillhaven* and *ITT Industries,* supra, employees of the Respondent employed at its facilities in Indiana and Iowa had a right to access the parking lots of the Respondent's Traco facility on September 8, 2011, to engage in organizational handbilling, unless security needs or related business justifications warranted the restriction of such access.

[14] I do not find the Board's analysis of the "struck work" to be relevant to the issue before me since it involves the "ally" doctrine and not an analysis of the single-employer doctrine.

[15] In denying enforcement to this portion of the Board's decision, the Fifth Circuit concluded that since the clause itself did not contain the requirement that the employers constitute a single employer, the clause was unlawful until rewritten within the limits of the single-employer doctrine. The court noted that the Board added the requirement that the employers must constitute a single employer but that the language for which the union was striking did not specifically include such a requirement. 301 F.2d at 28–29.

The Respondent contends it did not fully prohibit the access of employee handbillers to the Traco facility because it granted reasonable access to union handbilllers, including its off-site employees, by permitting them to handbill on walkways connected to its employee parking lots located across Unionville Road from its facility. While in its brief the Respondent contends that the walkways from the southernmost parking lot located to the west of Unionville Road to the crosswalks are its property (R. Br. at 28) there is no record evidence clearly establishing this to be the case. The Respondent contends that granting further access to the Traco facility "would have impeded safe employee ingress and egress into the facility."

Even if the walkways from the Respondent's parking lots located to the west of Unionville Road are its property, I do not find the safety argument advanced by the Respondent sufficient to justify its prohibition against employees of Alcoa Inc. engaging in organizational handbilling in the parking lots and other outdoor areas immediately adjacent to the Traco facility on September 8, 2011. As noted above, handbillers, including Alcoa Inc. employees from Iowa and Indiana, passed out organizational handbills at walkways leading to and from the two employee parking lots that were located to the west of Unionville Road. However, immediately adjacent to the Respondent's Traco facility, which is located to the east of Unionville Road and south of Progress Avenue, five additional employee parking lots are located. Since the Respondent's offsite employees were not permitted access to these areas, the Union placed handbillers on the public right-of-way at the two entrances to parking lots that are located on Progress Avenue and two of the entrances to parking lots located on the east side of Unionville Road.

With respect to the entrance to the parking lot on the east side of Unionville Road that was closest to the intersection of Unionville Road and Progress Avenue, the Union chose to station handbillers on the walkway across Unionville Road from the entrance to that parking lot. It was from this location that the Union could pass out handbills to employees coming from the parking lots located to the west of Unionville Road. Thus, while the Union did have the ability to pass out handbills to the employees who parked on the parking lots to the west of Unionville Road, it was limited in its ability to reach the employees who parked in the parking lots immediately adjacent to the Traco facility, because of the Respondent's refusal to permit offsite employees access to those areas.

The only argument advanced by the Respondent to deny access to its offsite employees to those areas is that it would have impeded safe employee ingress and egress into the facility. However, there is no evidence to support that argument. It is uncontroverted that the handbilling was peaceful and that there is no evidence of impeding ingress or egress into the Traco facility. I fail to see how it would have been an impediment to the safety of employees entering and exiting the facility for offsite employees to be permitted to give out handbills and speak to employees as they were coming to and leaving their cars in the parking lot. It certainly would not present greater safety issues regarding employee ingress and egress to the facility than those which existed by virtue of the fact that handbillers passed out handbills at the entrance to the parking lots, while employees were in their cars and attempting to enter or exit onto the public highway. Thus, I find that the Respondent has not established a legitimate business reason for barring the offsite employees who were present on September 8 from access to the parking lots and outside areas immediately adjacent to the Traco facility. Accordingly, on the basis of the foregoing, I find that the Respondent, by refusing to permit employees from its offsite facilities to engage in organizational handbilling in the parking lots and other outside areas immediately adjacent to the Traco facility on September 8, 2011, violated Section 8(a)(1) of the Act.

Whether the Respondent Engaged in Surveillance of its Employees' Union Activities in Violation of Section 8(a)(1) of the Act on September 8, 2011

The Acting General Counsel and the Union contend that on September 8, 2011, the Respondent engaged in unlawful surveillance in violation of Section 8(a)(1) of the Act by engaging in the following conduct: in the parking lots immediately adjacent to the Traco facility, management personnel "roamed" the property and stood in the parking lots in groups; security guards in trucks and golf carts traveled in the outside areas immediately adjacent to the Traco facility and along Unionville Road; a security guard assisted employees in crossing Unionville Road from the employee parking lots located to the west of Unionville Road; General Manager Jost crossed Unionville Road and positioned himself between the employee parking lots and handbilllers and observed employees as they went past the handbilllers; and that Jost stood behind an employee's car while the employee spoke to Union Representative Ornot at the entrance to a parking lot on Progress Avenue.

While the Acting General Counsel acknowledges that an employer may observe open union activity on or near an employer's property, he contends if an employer engages in conduct that is "out of the ordinary" while observing such activity it constitutes unlawful surveillance. *Arrow Automotive Industries*, 258 NLRB 860 (1981), enfd. 679 F.2d 875 (4th Cir. 1982). The Acting General Counsel and the Union argue that each of the instances noted above constitutes unlawful surveillance under the standards utilized by the Board.

The Respondent denies that it engaged in any unlawful surveillance of employees' union activities on September 8, 2011. In support of its position, the Respondent also notes that an employer who merely observes employees openly engaging in union activity at or near the employer's property does not engage in unlawful surveillance. *Roadway Package System,* 302 NLRB 961 (1991). The Respondent also agrees that it is only if an employer does something out of the ordinary, beyond mere observation, that such conduct may result in a finding of unlawful surveillance. *Loudon Steel, Inc.* 340 NLRB 307, 313 (2003). Finally, the Respondent asserts that the test for determining whether an employer's conduct is found to be unlawful surveillance, involves the determination of whether the employer's conduct, under the circumstances, would objectively tend to restrain or coerce employees in the exercise of Section 7 rights. *Aladdin Gaming, LLC*, 345 NLRB 585 (2005).

As the parties acknowledge, it is well established that when employees openly engaged in union activities on or near an

employer's premises, open observation of such activities by an employer is not unlawful. *Aladdin Gaming, LLC,* supra at 585–586; *Roadway Package System,* supra at 961; and *Arrow Automotive Industries*, supra at 860.

In the instant case, the Union chose to engage in organizational handbilling at or near the Respondent's Traco facility with a relatively large group of 24 handbilllers. Thus, it is the Acting General Counsel's burden to establish, by a preponderance of the evidence, that in each of the instances noted above, the Respondent's observation of such activity was "out of the ordinary" and constituted unlawful surveillance.

With respect to the claim that it was unlawful for management personnel to move to different areas in in the facility and stand in groups in the parking lot, the testimony provided by the witnesses for the Acting General Counsel was somewhat vague. A synthesis of the testimony of Manzolillo, Ornot, and Kreibel establishes that Jost, Clancy, Randall, and Human Resources Manager Susan Vitro were observed in the parking lot areas immediately adjacent to the Traco facility on the east side of Unionville Road while the handbilling was taking place. As will be discussed later herein the only evidence of a supervisor moving to a different location involved Jost. While Kriebel credibly testified that in 28 years he had not observed supervisors standing in the parking lots, the only thing that the four identified management officials did was to observe the handbilling being conducted at the entrances to the Traco facility. I find that by merely observing the union activity being conducted at its premises the Respondent did not violate Section 8(a)(1) of the Act.[16]

With regard to the contention that the Respondent engaged in unlawful surveillance by virtue of its security guards patrolling the Traco facility, the credited testimony of Manzolillo[17] establishes that occasionally a security guard in a golf cart drove in the parking areas adjacent to the Traco facility. Also on occasion a security guard would walk in those areas. Manzolillo also observed a vehicle with security guards drive down Unionville road past the handbillers on "a couple of times" during the approximately 3 hours the handbilllers were present. Manzolillo testified that since he had never been to the facility prior to September 8 he was unaware of the usual practice of the security guards.

Since, on its face, the conduct of the security guards appears to be mere observation of open Section 7 activities, and there is no evidence that the security guards acted in a manner that is a deviation from the Respondent's normal practice, I find that such conduct does not violate Section 8(a)(1) of the Act.

As noted above, the Acting General Counsel and the Union contend that the conduct of the security guard in assisting employees crossing Unionville Road constitutes unlawful surveillance of the handbilling activities. Manzolillo's credited testimony establishes that during the period that handbilling was being conducted, he observed a security guard who was standing at a parking lot entrance to the Traco facility across Unionville Road from where handbilling activity was taking place on the walkway. On approximately six occasions, the security guard came halfway across Unionville Road and escorted employees across the road to the entrance to the Traco facility. On some occasions, no traffic was coming when the security guard engaged in this conduct. The security guard did not say anything to any of the handbilllers. Kriebel did not testify regarding whether such conduct was a regular part of the security guard's duties or whether this conduct was something out of the ordinary.

On its face, the conduct of the security guard appears to be normal safety related conduct that is noncoercive. Since there is no evidence to establish that this conduct was out of the ordinary, I find that the actions of the security guard did not violate Section 8(a)(1) of the Act.

The Acting General Counsel and Union allege that Jost's conduct in crossing Unionville Road and positioning himself between the employee parking lots to the west of Unionville Road and the area where the handbillers stood constitutes unlawful surveillance in violation of Section 8(a)(1). As noted above, the approximately 6 a.m. on September 8, Jost crossed Unionville Road and stood in the walkway nearest to the intersection of Progress Avenue and Unionville Road in the area between where the handbillers were and the employee parking lot. Jost stood about 10 feet away from where the handbilllers stood. As noted above, approximately seven to eight handbillers were near that walkway passing out handbills while Jost was present. Jost stood in that area for approximately 20 to 30 minutes and spoke briefly to employees as they passed by him before they reached the handbillers. Neither Manzolillo nor Ornot could hear what Jost said to employees as they were standing approximately 40 feet away.

In defense of this allegation, the Respondent contends that there is no evidence that Jost's conduct was not part of his normal morning routine. As noted above, Jost did not testify at the hearing. Kriebel credibly testified, however, that he had never observed any of Respondent supervisors standing in the parking lots. If the Respondent's supervisors did not generally stand in the parking lot, I find it reasonable to conclude that Jost's conduct in crossing Unionville Road to speak to employees as they exited the employee parking lots is not something that he regularly did. While I have found that the Respondent acted lawfully when it supervisors observed the handbilling activity that was being conducted at the entrances to the Traco facility, I find that the conduct of Jost in positioning himself between the parking lots located to the west of Unionville Road and where the handbillers were located on the walkway was different in kind. If Jost was merely attempting to ascertain whether employees were being impeded by the handbillers as they exited the parking lot and traveled on the walkway to cross Unionville Road, he could have been determined that quickly. Since there is no evidence of handbillers impeding employees, Jost's continued presence in the area very close to where the handbilling occurred for 20 to 30 minutes suggests that he was determining which employees were accepting handbills from the Union. Accordingly, I find that by engaging in such con-

[16] I find this case distinguishable from *Arrow Automotive Industries*, supra. There, 11 supervisors lined up in varying numbers at each of the employer's gates to its premises on 2 of the 3 days that handbilling occurred.

[17] I find Manzolillo's testimony on this issue to be more specific than that of Ornot and accordingly I base my findings on it.

duct, the Respondent, through Jost, engaged in unlawful surveillance of employees' union activities and violated Section 8(a)(1) of the Act. See *Loudon Steel, Inc.*, above at 313.

Finally, the Acting General Counsel and the Charging Party contend that Jost's conduct in standing behind an employee's car while the employee spoke to Ornot at the entrance to a parking lot on Progress Avenue constituted unlawful surveillance.

As an employee was exiting from the Traco facility on to Progress Avenue, he stopped and took a handbill from Ornot, who was standing just outside the entrance on the public right-of-way. While this was occurring, Jost was standing approximately 2 feet behind the employee's car. After the employee drove off, Jost told Ornot that he "was getting kind of far on Alcoa property." Ornot replied that he was not and that he was standing at the edge of the road. There was no further conversation between the two of them. I find that rather than engaging in unlawful surveillance, Jost was merely monitoring the Respondent's property line regarding a possible trespass by a nonemployee union representative such as Ornot. Again, I find that this incident falls within the ambit of an employer's right to observe union activity that is openly conducted at or near its premises. Accordingly, I find that this conduct by Jost did not violate Section 8(a)(1) of the Act.

Whether the Respondent has Maintained and Overly Broad Solicitation and Distribution Rule in Violation of Section 8(a)(1) of the Act

It is undisputed that on June 27, 2011, the Respondent promulgated and has since maintained a solicitation and distribution policy (Jt. Exh. 13) at the Traco facility which states:

> In the interest of efficiency and for the protection of our employees, the Company has adopted a policy concerning verbal solicitation and distribution of written materials by employees and non-employees.
>
> Distribution of any kind, for political, charitable, or other purpose, by employees in working areas is prohibited at all times. Solicitation for any purpose during working time is prohibited. Neither may an employee who was not on working time solicit an employee who is on working time. Working time includes periods when an employee is to be performing assigned job duties and does not include either break or lunch periods.
>
> Solicitation and distribution by nonemployees on company property is prohibited at all times.

In his brief, the Acting General Counsel contends that the portion of the rule that states "Distribution of any matter, for political, charitable, or other purpose, by employees in working areas is prohibited at all times." is overbroad and violates Section 8(a)(1) of the Act. In support of his position, the Acting General Counsel relies on *MTD Products,* 310 NLRB 733 (1993), and *Mission Foods,* 350 NLRB 336 (2007).[18] The Union also contends the rule is overbroad and unlawful.

The Respondent contends that it is privileged to prohibit employees from distributing literature in work areas. In support of its position, the Respondent relies on *United Parcel Service,* 327 NLRB 317 (1998), and *Hale Nani Rehabilitation,* 326 NLRB 335 (1998).

As the Respondent correctly notes, it is well established that an employer may lawfully prohibit employees from distributing literature in work areas at all times. *United Parcel Service,* supra; *Hale Nani Rehabilitation*, supra; *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962).

MTD Products, supra, relied on by the Acting General Counsel is easily distinguished from the instant case. In *MTD Products*, the Board found that an employer's rule prohibiting solicitation or distribution "[o]n Company premises . . . Unless approved by the company," was overly broad and violated Section 8(a)(1) of the Act. The Board found that the solicitation aspect of the rule was facially overbroad in that it was not restricted to working time and that the employer failed to produce any evidence that it told employees that solicitation during nonworking time was permitted. The Board noted that with respect to the "distribution" aspect, the rule was not confined to work areas. Id. at fn. 3. There is nothing in the Board's decision in *MTD Products* that detracts from the Board's longstanding policy regarding the lawful prohibition of the distribution of materials in work areas.

In *Hale Nani Rehabilitation*, supra, the Board succinctly summarized the critical difference its rules regarding solicitation and distribution as follows:

> Recognizing inherent differences between solicitations and distributions, the Board permits greater restrictions on Sec. 7 distributions than on solicitations. "[S]olicitation, being oral nature, impinges upon the employer's interest only to the extent that it occurs on working time, whereas distribution of literature, because it carries the potential of littering the employer's premises, raises a hazard to production whether it occurs on working time or nonworking time." *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 619 (1962). Thus, while a no- solicitation rule generally must be limited to working time, a no-distribution rule may properly extend to working areas even on nonworking time. *Eastex, Inc.* 215 NLRB 271, 274–275 (1974), enfd. 550 F.2d 198 (5th Cir. 1977), affd. 437 U.S. 556 (1978).

On the basis of the foregoing, it is clear that the Respondent's rule prohibiting the distribution of materials in working areas is lawful and that the promulgation and maintenance of this rule did not violate Section 8(a)(1) of the Act. Accordingly, I shall dismiss this complaint allegation.

CONCLUSIONS OF LAW

1. Alcoa Inc. and Alcoa Commercial Windows, LLC d/b/a Traco (the Respondent) constitute a single employer.

[18] In *Mission Foods*, no exceptions were filed to the administrative law judge's finding that the employer violated Sec. 8(a)(1) by maintaining an overly broad distribution rule. Id. at fn. 1. When the Board adopts a portion of an administrative law judge's decision to which no exceptions were filed, that portion of the decision is not binding precedent, *California Gas Transportation, Inc.*, 352 NLRB 246 fn. 3 (2008). Accordingly, I have not accorded precedential value to *Mission Foods* in determining whether the challenged distribution rule in the instant case is unlawful.

2. The Respondent has violated Section 8(a)(1) of the Act by:

(a) Denying its off duty and offsite employees access to the exterior nonwork areas, including parking lots, of the Traco facility for the purpose of engaging in the distribution of union organizational materials.

(b) Engaging in surveillance of employees' union activities by standing in close proximity to employees as the Union attempted to distribute organizational handbills.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[19]

ORDER

The Respondent, Alcoa Inc. and Alcoa Commercial Windows, LLC d/b/a Traco, a single employer, New York, New York, and Cranberry Township, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Denying its offduty and offsite employees access to the exterior nonwork areas, including parking lots of its Cranberry Township, Pennsylvania facility for the purpose of engaging in the distribution of union organizational materials on behalf of United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO, CLC, or any other labor organization.

(b) Engaging in surveillance of employees engaged in union and protected concerted activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Grant its offduty and offsite employees access to the exterior nonwork areas, including parking lots, at its Cranberry Township, Pennsylvania facility for the purpose of engaging in the distribution of union organizational materials.

(b) Within 14 days after service by the Region, post at its facility in Cranberry Township, Pennsylvania, copies of the attached notice marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 8, 2011.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., September 20, 2013.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT deny our off-duty and offsite employees access to the exterior nonwork areas, including parking lots of our Cranberry Township, Pennsylvania facility for the purpose of engaging in the distribution of union organizational materials on behalf of the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO, CLC, or any other labor organization.

WE WILL NOT engage in surveillance of employees engaged in union and protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL grant our off duty and offsite employees access to the exterior nonwork areas, including parking lots, at our Cranberry Township, Pennsylvania facility.

ALCOA INC. AND ALCOA COMMERCIAL WINDOWS, LLC D/B/A TRACO, A SINGLE EMPLOYER

[19] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[20] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."